defendant has entirely closed its mind to giving consent. If it has done so I would have no hesitation to say that its refusal has been unreasonable. Should I therefore grant the prayer (c) asked for by the plaintiff in the interest of justice? I think so **provided** the plaintiff is willing and able to meet the monthly repayment of the loan and update or settle part of the interest arrears as may be agreed by the defendant.

The plaintiff no doubt can say that the loan with the defendant is a subject matter of a pending Court action. But in my view that is not relevant here and should not be taken into consideration without more in coming to a decision in this case.

I therefore only grant the order as prayed for under prayer (c) of the statement of claim subject to the proviso aforementioned.

In view of the nature of my order I think it is appropriate that each party pays its own costs.

PUBLIC PROSECUTOR

v.

LIM BOON HIENG @ LIM BOON SIANG

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[CRIMINAL APPEAL NO. KG. 37 OF 1992/III]
8 SEPTEMBER 1993

CRIMINAL LAW: Charge under s. 4(b) Prevention of Corruption Act 1961 - Appeal on acquittal by Sessions Court - Cash paid to agent of government - To refrain from taking action for operating tug boat without valid licence, complete ship equipments and employing a juragan without trade certificate - Offence under Merchant Shipping Ordinance - Whether ownership of tug boat proved - Whether prosecution required to prove offence actually committed - Appeal against acquittal.

The accused was charged for giving cash of RM120 to a government agent as inducement to refrain from taking action against accused for offence under the Merchant Shipping Ordinances. A tugboat was stopped by the police on suspicion of offence under the Ordinance. The crew of the tugboat were given to produce the licence from where it was thought to be kept but failed to do so. The accused turned up and identified himself as the "Towkey" and in the process of inspection by the police the accused went up to PW6 a police lance corporal and offered money twice.

At the end of prosecution case the Sessions Court called for the defence and ruled that PW6 was an agent of the Government of Malaysia, it was established RM120 was given to PW6 by the accused and thus presumed under s. 14 of the PCA 1960 to be given corruptly. There was sufficient evidence to infer corrupt motive of accused and that the tugboat of the accused was inspected by the police earlier before the accused turned up as the "Towkey".

The defence was one of denial. The Sessions Court at the end of the trial took the ownership of the tugboat and giving of the money as issues in dispute. The Sessions Court concluded that the prosecution had not proven beyond reasonable doubt that the accused was the owner of the tugboat and that if that was so the accused could not be charged for the offence under the Merchant Shipping Ordinance. The Sessions Court then acquitted the accused.

Held:

[1] As the Sessions Court Judge had ruled before calling the defence that the tugboat was the accused's and no reason was given for this change in finding tantamounts to a failure of justice.

[2] By calling the defence it can be safely inferred the Sessions Court Judge was satisfied that the relevant ingredients of the charge preferred had been established.

[3] The question of ownership of the tugboat was not a crucial issue as they are one of the descriptive elements of the Act or forbearance of the agent envisaged by s. 4(b) of the Act.

[4] Whether the accused did commit an offence under the Merchant Shipping Ordinance was not crucial to secure a conviction under s. 4(b) PCA.

[5] Appeal allowed and acquittal set aside. Retrial ordered.

[Appeal allowed].

Cases referred to:

Munusamy v. Public Prosecutor [1987] CLJ 250 / [1987] 1 MLJ 492 ***(refd)***

Public Prosecutor v. Baldev Singh [1985] 1 CLJ 348 / [1985] 2 MLJ 453 ***(refd)***

Mat v. Public Prosecutor [1963] 29 MLJ 263 ***(refd)***

Mohamed Taufik v. Public Prosecutor [1975] 1 MLJ 36 ***(refd)***

Legislation referred to:

Merchant Shipping Ordinance

Prevention of Corruption Act 1961, ss. 4(b), 6(1), (2), 14

For the appellant - Zaki Yasin, DPP

For the respondent - Anthony Tai; M/s. Anthony Tai

JUDGMENT

Richard Malanjum JC:

This is an appeal by the Public Prosecutor against the order of acquittal of the respondent made by the learned Sessions Court Judge at the conclusion of the whole case on the charge as follows:

> That you, on 26 September 1990 at about 11.00 a.m. at Sungai Sebako, Sejingkat, Kuching in the State of Sarawak, did corruptly give gratification, to wit, cash in the sum of Ringgit One Hundred and Twenty (RM120) to L/Cpl. 45455 Nosah ak. Nokel, as agent of the Government of Malaysia, as an inducement to refrain from doing an act in relation to his principal affair to wit, to refrain from taking action against you for an offence of operating your tug boat M.V. Sin Hua Lian No. 4, without a valid licence, complete ship equipments and by employing a juragan Sabli Bin Ariffin who did not possess a Trade Certificate, under the Merchant Shipping Ordinance, and you hereby committed an offence punishable under s. 4(b) and punishable under s. 4 of the Prevention of Corruption Act 1961.

The Public Prosecutor is dissatisfied with the said order on the grounds as contained in his petition of appeal dated 13 August 1992 and which reads as follows:

(1) The learned Sessions Judge erred in law and fact when he failed to consider that the ownership of the tug boat being it of the respondent as was being so impressed at the scene did operate in mind of L/Cpl. Nosah ak. Nokel (PW6) when he received the said money from the respondent with the description of "Ini wang untuk kopi-o."

(2) The learned Sessions Judge erred in law when he obviously placed an unnecessary burden upon the prosecution for an offence under s. 4(b) of PCA 1961, to further prove the actual and legal ownership of the subject matter (a tug boat) of which the corrupt payment was intended and related to.

(3) The learned Sessions Judge further misdirected his mind when he obviously placed a burden upon the prosecution to further prove that the favour sought was in relation to **the offence actually committed** by the respondent which was indeed not in law required for an offence under s. 4(b) in the light of s. 6(2) of PCA 1961.

(4) The learned Sessions Judge failed to consider that the defence put up by the respondent was indeed nothing but only one of denial.

(5) The decision made by the learned Sessions Judge was against the weight of evidence adduced.

It is the case for the prosecution that on 26 September 1990 at 10.30 a.m. a party of Marine Police stopped a tug boat M.V. Sin Hua Lian No. 4 as it was suspected that offences under the Merchant Shipping Ordinance had been committed. However the Marine Police gave the crew of the tug boat the opportunity to get the boat licence from the office where it was believed to have been kept. Unfortunately no licence was brought back. Instead the respondent came along who was introduced to the police party as the 'towkey'. Thereafter checks were made on the tug boat by the Marine Police and it was at the point when Lance Corporal Nosah (PW6) was conducting a check at the back of the tug boat that the respondent was said to have gone

to see him and offered him money twice, initially with RM100 and then another RM20. The respondent was alleged to have said "Ini wang untuk kopi-o" when giving the money to PW6.

At the end of the prosecution case and after hearing the respective submissions of the defence Counsel and the prosecuting officer the learned trial (Sessions Court) Judge called for the defence. In his ruling he stated the following, in summary:

(i) that it had been sufficiently established from the evidence adduced that PW6 was an agent of the Government of Malaysia;
(ii) that there was sufficient evidence establishing that the respondent gave RM120 to PW6;
(iii) that accordingly, under s. 14 of the Prevention of Corruption Act 1961 ("the Act") it was to be presumed that the sum paid was given corruptly;
(iv) that even without the aid of s. 14 there was sufficient evidence adduced at that stage to infer corrupt motive on the part of the respondent; and
(v) that the Marine Police had checked the tug boat of the respondent some hours earlier before the alleged giving of the money and found to be without safety equipment, the juragan was without trade certificate and no licence. The crew when given the opportunity to look for their 'towkey' brought the respondent with them.

It is to be noted that the learned trial (Sessions Court) Judge in finding that a *prima facie* case had been established did not indicate any doubt on the ownership of the tug boat nor any importance was given to such issue. Further, nothing was also said that as a matter of law the respondent must have committed an offence thus providing the motive for him to give the sum as alleged and therefore guilty as charged. In short, the learned trial (Sessions Court) Judge found sufficient evidence to warrant a conviction of the respondent unless rebutted without the issue of ownership of the tug boat and commission of an offence being in doubt.

The defence of the respondent was substantially one of denial. He denied *inter alia*:

(i) being the owner of the tug boat in question;
(ii) being the employer of one Borhan (PW3);
(iii) giving any money to Lance Corporal Nosah ak. Nokel (PW6);
(iv) going to the back of the tug boat;
(v) being interested in the settlement of the problem of PW3 or the tug boat with the Marine Police;
(vi) having introduced himself as the owner of the tug boat to the Marine Police;
(vii) having said 'Ini wang untuk kopi-o';
(viii) having any responsibility over the tug boat and its affairs; and
(ix) that PW3 introduced him as his "towkey" but what PW3 meant was that he was only "a towkey".

I now deal with the grounds of appeal.

(a) Grounds one, two and three:

In his judgment at the end of the whole case the learned trial (Sessions Court) Judge took the ownership of the tug boat and the giving of the money and the utterance of 'Ini wang untuk kopi-o' as issues in dispute. While referring to the wordings of the charge preferred against the respondent the learned trial (Sessions Court) Judge held that it was therefore for the prosecution to show that the tug boat belonged to or was owned by the respondent, that the respondent was operating it and that the respondent had committed offences under the Merchant Shipping Ordinance. Accordingly, by reasons of the evidence of the juragan Sabli bin Ariffin (PW2) and PW3 after going briefly into them, the absence of ownership certificate or other forms of documents being presented to prove ownership and the denial by the respondent of the ownership, the learned trial (Sessions Court) Judge concluded that the prosecution had not proved beyond reasonable doubt that the respondent was the owner of the tug boat. This was what he said:

> From this set of evidence, it is very clear that the prosecution has not been able to prove beyond a reasonable doubt that the accused was the owner of the tug boat and/or the tongkang. To my mind, this issue is important and cannot be brushed aside as being insignificant. For if the tug boat did not belong to this accused and he did not operate it, then whatever offences committed in relation to it under the Merchant Shipping Ordinance cannot be his responsibility. He cannot be charged for those offences

What puzzles me is that contrary to what the learned Counsel for the respondent has submitted the issue of ownership of the tug boat has been considered by the trial (Sessions Court)

Judge before calling for the defence. He said this in his ruling:

> Only some hours earlier, the same group of marine policemen had checked **the accused's tug boat** and found it to be without safety equipment, a juragan with no trade certificate, and no licence.
> (emphasis added)

He made that finding with the full knowledge and benefit of the evidence of PW2 (Sabli bin Ariffin) and PW3 (Borhan bin Hashim). Yet he came to a different finding in his judgment at the end of the case also on the basis of the evidence of PW2 and PW3 and the bare denial of the respondent. No reason was given in his judgment as regards to the change of his finding. In my view this is an unsatisfactory feature of the judgment of the trial Court which tantamounts to a failure of justice. On this point alone I find it difficult to say that the order of acquittal can be justified. After all the issue of ownership of the tug boat was the primary basis of the said order. Furthermore, by calling for the defence it can be safely taken that the learned trial (Sessions Court) Judge must have been satisfied that the relevant ingredients of the charge preferred against the respondent have been established. Otherwise he should not have called for the defence. [See: *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492; *Public Prosecutor v. Baldev Singh* [1985] 2 MLJ 453]. And having called for the defence it was incumbent upon the trial Sessions Court Judge to consider the case as a whole and to come to a finding whether the prosecution had proved its case beyond reasonable doubt before he could convict the respondent in the light of the evidence adduced by the defence. Of course even if he did not believe the defence story but he had reasonable doubt on the prosecution case he should acquit. [See: *Mat v. Public Prosecutor* [1963] 29 MLJ 263]. Unfortunately in this case the approach adopted by the trial (Sessions Court) Judge at the end of the whole case was one of confusion. It was an approach which should have been taken at the end of the prosecution case. Thus, as stated earlier on I do not see how the order of acquittal can withstand.

In any event and with respect to the learned Counsel for the respondent I am of the view that the issue of ownership of the tug boat is not a crucial issue as was given by the trial Court. The issues of ownership of the tug boat and the offences under the Merchant Shipping Ordinance in my view are only descriptive elements of the act or forbearance of the agent envisaged by s. 4 (b) of the Act. The important ingredients of the said section in relation to this present case are:

(i) that the recipient must be an agent of the Government of Malaysia which was not disputed;
(ii) that the respondent gave the sum of RM120 to the agent; and
(iii) that the money was given corruptly as an inducement for the agent to act or forbear.

As to whether the respondent had actually committed an offence under the Merchant Shipping Ordinance it was not crucial in order to secure a conviction under s. 4(b) of the Act. The respondent was not before the Court on a charge for an offence under the Merchant Shipping Ordinance. As said by his Lordship Abdul Hamid J. (as he then was) in *Mohamed Taufik v. Public Prosecutor* [1975] 1 MLJ 36 at p. 38F (right) that:

> In view of s. 6(1) of the Prevention of Corruption Act 1961, it is evident that there was no necessity for the prosecution to prove that the person who gave a bribe had indeed committed an offence.

Although his Lordship was dealing with s. 6(1) of the Act which is on a proceeding against an agent for receiving a gratification such construction can, in my view, be adopted in respect of s. 6(2) which deals with a giver of gratification. Accordingly failure to positively prove the ownership of the tug boat and hence the commission of an offence under the Merchant Shipping Ordinance should not have been taken as primary ingredients of s. 4(b) of the Act by the trial Court. The overall scope and object of that section which determine the ingredients of the offence therein should have been considered. This aspect of the judgment of the learned trial (Sessions Court) Judge is also, with respect, not satisfactory thereby resulting in the order of acquittal in error.

(b) Ground four and five:

Leaving the issue of ownership of the tug boat aside I also note in the judgment of the trial Court that having decided on the foregoing issue it did not make any finding on the issue of payment of gratification in the light of the defence. I would think that that issue was quite clear as there was the production of RM120 as an exhibit which the trial Court ordered to be

forfeited and paid to the government revenue. But as the trial Court made no finding on this issue at the end of the case which had the advantage of seeing and listening to the witnesses and the respondent in the witness box, I am of the view that justice demands that I should not make a finding solely based on the cold prints of the evidence recorded in this case.

(c) Conclusion:

Having therefore considered the judgment of the trial Court and the grounds submitted by the appellant, the Public Prosecutor, and having heard the submissions of the learned Deputy and the learned Counsel for the respondent for the reasons abovestated I hereby allow the appeal and set aside the order of acquittal of the respondent.

After having made such order the next question is whether I should substitute the finding to one of guilty. In view of the unsatisfactory features and conclusions in the judgment of the trial Court including the failure to consider the case as a whole in the light of evidence adduced by the prosecution and the defence I am of the view that in the interest of justice the proper order to make in this instant case is to order for a retrial of the respondent before another Sessions Court Judge and I so order. I also set aside the order of forfeiture of RM120 made by the trial Court.

PUBLIC PROSECUTOR

v.

MOHD. JAMIL B. YAHYA & ANOR.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CRIMINAL TRIAL NO. 47-3-92]
26 SEPTEMBER 1993

DANGEROUS DRUGS: Trafficking - Whether informer was a spy or an agent provocateur - Common intention - Custody and Control - Sections 39(B)(1)(a), (2) Dangerous Drugs Act 1952.

EVIDENCE: Exception to hearsay rule - Declarant dead - Bad character - No corroboration - Weight to be given - Section 32(1)(i) Evidence (Amendment) Act 1993.

A car driven by the 1st accused was stopped at a road block. A bag containing 5 packages of dried leaves was found on the floor board in front of the front passenger seat. The 2nd accused was sitting in the front passenger seat. The prosecution, from the facts, could not show common intention of both accused in respect of the offence as it was not shown which of the two accused put the bag in the car.

The prosecution, however, also relied on a statement made by Azali bin Mat Jam, deceased, made during the course of an investigation under s. 112 of the Criminal Procedure Code involving the two accused to prove its case. Azali bin Mat Jam, deceased, was the person who gave signal to the police before the two accused left in the car. The prosecution admitted the said statement under s. 32(1)(i) Evidence (Amendment) Act 1993. In the statement Azali implicated both the accused of trafficking in cannabis. It also contained hearsay evidence and revealed Azali's bad character.

Held:

[1] The weight and degree of credit to be attached to a statement by a declarant under paragraph (i) who is patently not disinterested must be examined with the greatest of caution lest false stories or a false colouring to the stories given by the declarant in the statement makes the Court draw a jaundice view of facts which cannot be verified through the cross-examination of the declarant and facts which may falsely implicate an accused. And more so where an accused faces a charge carrying a